

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK A. WEISHAAR,

Defendant-Appellant.

UNPUBLISHED

July 8, 2004

No. 246311

Oakland Circuit Court

LC No. 2002-184155-FH

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of felonious assault, MCL 750.82, and malicious destruction of a building less than \$200, MCL 750.380(5). We affirm.

This case arises out of a fight that occurred at a residential social gathering. The evidence included that defendant was at the gathering being held in a garage when he started arguing with Dawn Doyon. Defendant was asked to leave and, after shoving someone, left the garage. After he got outside, he broke two windows out of the garage and yelled for the people to come out. Bill Sadler and Carl Whetstone were the first to leave the garage and go outside, then Richard Tracy and Doyon followed. Doyon approached defendant yelling and he punched her in the face. Whetstone then tackled defendant and they rolled around on the ground exchanging physical blows. Sadler attempted to stop the fight by striking or pulling defendant and, at some point, Tracy grabbed Sadler around his chest from behind and pulled him away from defendant. After Tracy pulled Sadler off and dragged him three to six feet back, and while Tracy still had Sadler in front of him in his arms, defendant stepped toward them and lunged or swung toward Sadler's chest area and struck Tracy's hand. Defendant then ran away from the scene so Tracy let go of Sadler. Tracy, Sadler, and Whetstone were all bleeding from apparent knife wounds and sought medical attention.

Defendant was charged with assault with intent to do great bodily harm less than murder with regard to Whetstone, felonious assault with regard to Doyon, Sadler, and Tracy, and malicious destruction of a building less than \$200. The jury was instructed as to defendant's theory of self-defense with regard to the felonious assault charges related to Whetstone and Sadler, only. Defendant was found guilty on the felonious assault charge with regard to Tracy and on the malicious destruction charge. He appeals.

Defendant argues that the trial court improperly denied his request for a jury instruction on self-defense with regard to the felonious assault charge with regard to Tracy. He claims that since his intended victim was Sadler and not Tracy, under a theory of transferred intent, he was entitled to a self-defense instruction. After de novo review of this instructional error claim, *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002), we disagree.

To prove felonious assault, the prosecutor had to establish “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The intent element may be proven by inference from the defendant’s conduct and surrounding circumstances. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). The intent element may also be established through the doctrine of transferred intent which provides that as long as the defendant had the requisite intent as to any of the victims, such intent transfers to even an unintended victim. *Id.* at 350-351, quoting *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979). A self-defense instruction is proper if there is evidence to establish that the defendant honestly believed that he was in serious danger such that immediate action was necessary to abate the imminent threatened harm. *People v Riddle*, 467 Mich 116, 126-127; 649 NW2d 30 (2002); *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995).

Here, we consider the felonious assault charge with respect to Tracy, only. The evidence was sufficient to establish that defendant assaulted Tracy with a blade of some sort. Defendant’s intent to injure Tracy could have been inferred by the jury directly from his actions—lunging or swinging a sharp blade in Tracy’s general direction consistent with defendant’s reckless, defiant, and angry behavior. The jury could also have concluded that defendant intended to injure Tracy because he intended to assault Sadler, i.e., through a transfer of intent theory, but such a conclusion was not necessary to support the conviction.

To be entitled to a self-defense instruction with regard to defendant’s felonious assault against Tracy, evidence would have to support a finding that defendant honestly believed Tracy or Sadler to be a threat to him. See *Riddle*, *supra* at 124. No evidence was presented that could lead to the conclusion that Tracy was a threat—it is undisputed that Tracy never touched or threatened to touch defendant. The evidence also firmly established that Sadler was not a threat to defendant when defendant stabbed Tracy because Sadler had been pulled away from defendant and was being held by Tracy. However, instead of using the opportunity created by Tracy to retreat from any alleged threat, defendant chose to stab someone. See *id.* at 127. Thus, we agree with the trial court that defendant was not entitled to a self-defense instruction with regard to his felonious assault against Tracy because there was no evidentiary support for a conclusion that defendant was faced with the threat of imminent harm from Tracy or Sadler at the time of the stabbing.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski